No. 89-698

Supreme Court, U.S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1989

JOHN PAUL LEISURE
Petitioner,

VS.

STATE OF MISSOURI
Respondent.

On Petition for a Writ of Certiorari
to the Missouri Court of Appeals for the
Western District of Missouri

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Petitioner's Due Process Rights were violated by allowing the jury to view horrifying photographs which the Lower Court of Appeals held had no probative value.

2. Whether or not the Lower Court of Appeals erred in refusing to find reversible error in the denial and refusal of a jury instruction in violation of the Due Process Clause embodied in the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether or not the refusal to strike a juror for cause who unequivocably expressed during voir dire that he required the defendant to put on evidence by testifying was reversible error.

TABLE OF CONTENTS

Page

Questions Presented for Review ..... i, 2

Table of Contents ii

Table of Authorities iii

Introductory Statement 1

Reference to Opinions 2

Jurisdictional Statement 2

Constitutional Provisions and Statutes Involved 3

Statement of the Case 4

Argument for Granting the Writ 6

Argument 7

Conclusion 18

Certificate of Service 19

TABLE OF AUTHORITIES

Pages

Cases:

Andres v. United States, 333 U.S. 740, 68 S. Ct. 880 (1947) 13

Byrd v. United States, 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570 (1900) 13

Charles v. State, 573 S.W. 2d 139 (Mo. App. 1978) 16

Floyd v. State, 360 S.W. 2d 630 (Mo. 1962) 9

Gargotta v. United States, 77 F.2d 977 (C.C.A. Mo. 1935) 16

Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) 8, 15, 16

Mathews v. United States, 485 U.S. _____ , 108 Ct. _____ , 99 L. Ed. 2d 54 (1988) 13

Murphy v. Florida, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975) 15

Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982) 15

State v. Aitkens, 179 S.W. 2d 84 (Mo. 1944) 13

State v. Byrd, 646 S.W. 2d 419 (Mo. App. 1983) 16, 17

State v. Burnett, 188 S.W. 2d 51 (Mo. 1945) 12

State v. Carter, 544 S.W. 2d 334, 338 (Mo. App. 1976) 17

TABLE OF AUTHORITIES (Continued)

Pages

Cases:

State v. Chaney, 663 S.W. 2d 279 (Mo. App. 1983) 12

State v. Draper, 675 S.W. 2d 863 (Mo. Banc. 1984) 17

State v. Jones, 61 Mo. 232 (1875) 12

State v. Jones, 679 S.W. 2d 253 (Mo. Banc. 1984) 17

State v. Kinard, 245 S.W. 2d 890 (Mo. 1952) 11

State v. Robinson, 328 S.W. 2d 667 (Mo. 1959) 9

State v. Slaten, 252 S.W. 2d 330 (Mo. 1952) 11

State v. Wolfe, 701 S.W. 2d 777 (Mo. App. 1985) 17

Stevenson v. United States, 162 U.S. 313, 40 L. Ed. 98, 16 S. Ct. 839 (1896) 13

Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 754 (1965) 16

United States v. Boyd, 446 F.2d 1267, 1275 n. 27 (5th Cir. 1971) 16

28 United States Code, Section 1257(a) 2

Fifth Amendment ..... i, 2, 3, 4, 6, 10, 14, 16, 17

Fourteenth Amendment ..... i, 2, 3, 4, 6, 7, 8, 10, 14, 17

Missouri Supreme Court Rule of Criminal Procedure Section 28.02(a) 4

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

The Petitioner, John Paul Leisure, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Missouri Court of Appeals, Western District officially reported as 772 S.W. 2d 674 (Mo. App. 1989), handed down by the Missouri Court of Appeals, Western District, on the 18th day of April, 1989. The Opinion and Judgment of the Missouri Court of Appeals, Western District is Appended, bound in the Appendix and marked as Exhibit "A".

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not Petitioner's Due Process Rights were violated by allowing the jury to view horrifying photographs which the Lower Court of Appeals held had no probative value.

2. Whether or not the Lower Court of Appeals erred in refusing to find reversible error in the denial and refusal of a jury instruction in violation of the Due Process Clause embodied in the Fifth and Fourteenth Amendments to the United States Constitution.

3. Whether or not the refusal to strike a juror for cause who unequivocably expressed during voir dire that he required the defendant to put on evidence by testifying was reversible error.

REFERENCE TO OPINIONS

The Opinion and Judgment of the Missouri Court of Appeals, Western District, from which this appeal is taken is bound and marked in the Appendix as Exhibit "A".

JURISDICTIONAL STATEMENT

Petitioner seeks review of the Judgment of the Missouri Court of Appeals, Western District, entered on April 18, 1989. Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions which are relevant to the decision of this case are the Fifth and Fourteenth Amendments of the United States Constitution.

The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 28.02(a) of the Missouri Supreme Court Rules of Criminal Procedure states in pertinent part the following:

> . . . Other MAI - Cr Instructions in the 2.00 series must be given, whether requested or not, where applicable under the law to the facts. In addition the Court must instruct the jury upon all questions of law necessary for its guidance in returning a verdict.

STATEMENT OF THE CASE

Petitioner, John Paul Leisure, was indicted, along with five other men, on the 30th day of April, 1985, in the Circuit Court of the City of St. Louis, Missouri, as an accessory to capital murder in the killing of James Anthony Michaels, Sr. on September 17, 1980. The Defendants were severed on July 30, 1986 and thereafter, on December 30, 1986, a substitute information in lieu of indictment was filed. The case was tried on change of venue before the Circuit Court of Buchannan County, Missouri, on November 30 - December 7, 1987. During voir dire, upon questioning by defense counsel, Juror Reichman expressed his opinion that the Defendant should put on evidence and testify. The opinion was never retracted nor was the Juror's mind-set rehabilitated by either the Prosecution or the Trial Judge. A challenge for cause on this basis, inter alia, was refused by the Trial Court.

The defense raised their objection at the conclusion of the voir dire prior to the selection of the petit jury. The objection was raised orally and refused by the Trial Court. Additionally, the defense renewed their objection prior to the seating of the jurors, on the basis of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S.

Constitution as well as the applicable Missouri Constitution. See Appendix Exhibit "B". This error was also raised in the Motion for New Trial and as a point on appeal.

From the outset of the trial, Petitioner conceded the victim had been killed, that the nature and manner of death was occasioned by a bombing, the location of the killing and conceded that the victim was James Michaels, Sr. Despite these concessions, the Trial Court allowed the admission of gruesome photographs. The Missouri Appellate Court acknowledged when reviewing this case the photographs were indeed unimaginably gruesome, ghastly and horrifying. That Court conceded the photos did nothing to prove the real issue in the case and that the record revealed no reason for displaying the horror of the shredded and sundered body to the jury.

The defense objected to the introduction of the photographs at the stage when the prosecution sought to have them admitted into evidence. The objection was made orally based upon the denial of a right to fair trial and under the Due Process Clause of the Fourteenth Amendment. See Appendix Exhibit "C". The Trial Court simply overruled the objection Thereafter, Petitioner raised this ground in his Motion for New Trial and in Point IV in his Brief of Appellant to the Missouri Court of Appeals.

Testimony was elicited from the State's key witnesses, Ramo and Broderick, former associates, that after an initial plan to kill Michaels was aborted, a scheme was devised by all but John Paul Leisure to effect Michaels' death by bomb. The testimony was undisputed that Petitioner was against the killing and voiced his disapproval and non-participation to the others, who proceeded to carry out the plan notwithstanding. Based on this testimony, Petitioner offered an instruction on abandonment, which was refused.

The defense raised this objection during the instruction conference and it was orverruled. See Appendix Exhibit "D". The objection was raised in the Motion for New Trial and in the Brief of Appellant.

A Writ of Certiorari to the Missouri Supreme Court was denied on August 1, 1989. See Missouri Supreme Court Listing of Denial of Motion to Transfer, Appendix Exhibit "E".

ARGUMENT FOR GRANTING THE WRIT

a. The decision rendered by the Missouri Court of Appeals, Western District, that horrifying pictures having absolutely no probative value, may nevertheless be admitted subject to a Trial Judge's discretion, is in direct conflict with the mandates of the Due Process Clause of the Fifth and Fourteenth Amendments. This is an important issue needing to be addressed by this Court so that the Due Process Clause is not disregarded under the pretense of an appealing court giving unqualified deference to a Trial Judge's decision.

b. The decision rendered by the Missouri Court of Appeals upheld the refusal to grant a vital affirmative defense instruction, despite evidence to support the granting of the instruction, which denial abridges the constitutional guarantee of a fair trial.

c. A legitimate challenge for cause existed for a juror whose fixed opinion was in direct conflict with the Fifth Amendment's proscription against compulsory self-incrimination and the Lower Court of Appeals erred in failing to so find.

ARGUMENT

I.

WHETHER OR NOT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY ALLOWING THE JURY TO VIEW HORRIFYING PHOTOGRAPHS WHICH THE LOWER COURT OF APPEALS HELD HAD NO PROBATIVE VALUE.

Petitioner respectfully submits to this Court that his Due Process Rights, guaranteed by the Fourteenth Amendment of the United States Constitution, were violated when the Trial Court allowed the introduction of photographs where there was no probative value and there was substantial prejudice suffered by Petitioner by the admission of the same. Although Petitioner acknowledges that wide discretion is generally given to the Trial Judge in determining the admissibility of photographs in a capital murder trial, the Fourteenth Amendment's guarantee of Due Process does not confer unreviewable deference to a Trial Court's decision. Petitioner did not dispute and in fact conceded that a death had occurred, the nature and location of the wounds causing the death, the manner in which the death was occasioned, and the identity of the victim. Based on these concessions, the Missouri Court of Appeals, Western District, in its Opimion stated the following:

> "The photos are indeed unimaginably gruesome. Indeed, they are ghastly and horrifying. They show in color the bloody aftermath of bombing that severed the victim's upper torso from the remainder of his body, leaving his entrails trailing along the bloody road. The photos did nothing to prove the real issue in

> this case -whether John Paul Leisure participated in the planning and commission of James Michaels' murder. . . . The record reveals no reason for displaying the horror of the photographs of the shredded and sundered body of Mr. Michaels to the jury." (See Appendix Exhibit "A").

Nevertheless, the Court of Appeals upheld the Trial Court's decision to admit the photographs.

In *Irvin v. Dowd* 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), this Court stated that the failure to afford an accused a fair hearing violates even the most minimal standards of due process. A heightened standard of scrutiny is applicable in a capital murder case where one's life is at stake. Due process requires that the evidence received have some probative value and that such evidence be an aid to assist the jury in determining the facts in issue. Moreover, prior to the admissibility of this type of evidence, the probative value must be weighed against the prejudicial effect its admission will have on the jury. The Missouri Court of Appeals conceded that the photographs had no probative value and based upon the ghastly depictions, the prejudice to Petitioner was obvious and insurmountable.

Notwithstanding the Missouri Court of Appeals' acknowledgment that the photographs proved nothing in the case, the assignment of error was refused after the Court of Appeals gave absolute deference to the trial judge's discretion. Petitioner would submit that the admissibility of the photographs must have been consistent with the Due Process Clause of the Fourteenth Amendment in order for this conviction to pass constitutional muster.

Petitioner would acknowledge that the majority of cases found in Missouri and other States generally uphold the admissibility of photographs where there is some probative value. However, a separate line of cases does exist, and cases have been reversed, when the only possible motive for introducing similar pictures was to inflame the passion and prejudice of the jury. In *Floyd v. State* 360 S.W. 2d 630 (Mo. 1962), the defendant was charged with the murder of his grand-daughter. Within a few weeks, the badly decomposed body of the child was found. The State was unable to attach any probative value to the photographs taken of the child, but nevertheless the same were admitted into evidence. The Supreme Court of Missouri reversed *Floyd's* conviction due to the prejudice attendant the pictures in light of the fact that no probative value was attributable to them.

In *State v. Robinson* 328 S.W. 2d 667 (Mo. 1959), this Defendant's manslaughter conviction was reversed by the Supreme Court of Missouri because of the admission of photographs found to be extremely obscene, offensive, vulgar, horrid and repulsive. The *Robinson* Court held that the photographs were not probative of the issues because the defense had conceded those facts which the pictures sought to prove.

Each of these situations are analogous with the circumstances in Petitioner's case. Inasmuch as the Lower Court of Appeals could attach no probative value to the photographs of Michaels, the pictures were not relevant. Relevant evidence means evidence having any tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. The admission of irrelevant evidence flies in the face of the Due Process Clause, especially evidence of this nature introduced at a capital murder trial. This highly prejudicial error denied Petitioner's right to a fair trial and his unconstitutional conviction should be reversed.

II.

WHETHER OR NOT THE LOWER COURT OF APPEALS ERRED IN REFUSING TO FIND REVERSIBLE ERROR IN THE DENIAL AND REFUSAL OF A JURY INSTRUCTION IN VIOLATION OF THE DUE PROCESS CLAUSE EMBODIED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner, John Paul Leisure, respectfully submits that the Lower Court of Appeals erred in upholding the denial and refusal of a jury instruction inasmuch as it constituted a violation of the due process clause embodied in the Fifth and Fourteenth Amendments to the United States Constitution. At issue is Petitioner's Constitutional entitlement to have the jury instructed on a recognizable affirmative defense. In part, the instruction was refused under the guise of maintaining a uniform system approach of pattern jury instructions. Petitioner submits that the over-zealous and strict adherence to the Missouri approved instructions abridges the spirit of the Fifth and Fourteenth Amendments, resulting in an unconstitutional conviction.

The refused instruction, for which Petitioner feels aggrieved, is the denial of his abandonment instruction, which was proposed as an affirmative defense to the capital murder charge. This affirmative defense presented an evidentiary theory which, if believed, would have defeated the factual theory of the prosecution. The substantive law in Missouri states a defendant may make a prima facie case of abandonment of criminal intent by notifying the police or taking other reasonable positive steps to prevent the crime from being committed. (See Appendix Exhibit "A"). The evidence

presented by Government witnesses established that an original plan to murder Michaels was abandoned. Thereafter, the evidence showed that upon learning that a new plan had been devised to use explosives to cause Michaels' demise, Petitioner took no part to either procure the bomb, advise, urge or further that offense. In fact, the evidence undisputably showed that Petitioner was against the bombing and apprised the perpetrators of his non-participation and non-approval. Based on this evidence, Petitioner indeed took what reasonable positive steps as were available to prevent the crime from being committed.

The testimony fell squarely within the substantive law of Missouri, making the refusal to grant the instruction reversible error. [In the least, the evidence was sufficient to support a theory of innocence submitted by Petitioner.] Under Missouri law, the evidence should be reviewed in the light most favorable to the proponent to determine whether the evidence supports granting the instruction. In *State v. Kinard*, 245 S.W. 2d 890 (Mo. 1952), the Missouri Supreme Court stated the following:

> "Defendant is entitled to have any theory of innocence submitted to a jury, however improbable that theory may seem; if the most favorable construction of evidence supports it." Id at 892.

See also *State v. Slaten*, 252 S.W. 2d 330 (Mo. 1952) (trial court bound to properly and fully instruct jury . . . if there was any evidence upon the whole record, however improbable, in support of the theory. . .). The denial of this essential instruction deprived the jury of its province to properly consider this affirmative defense.

The granting of criminal jury instructions in Missouri is governed exclusively by the Missouri Supreme Court Rules of Criminal Procedure, Rule 28, et seq. One pertinent section states that the Court must instruct the jury upon all questions of law necessary for its guidance in returning a verdict. Missouri Supreme Court Rules of Criminal Procedure, Section 28.02(a). In *State v. Jones*, 61 Mo. 232 (1875), the Missouri Supreme Court stated the trial judge has the duty to give instructions on questions of law. Later in *State v. Burnett*, 188 S.W. 2d 51 (Mo. 1945), the Section was interpreted to mandate that the trial court was bound to give written instructions in the proper form setting forth the law on such questions.

The Trial Court refused the vital abandonment instruction because the proposed instruction in the opinion of the Court did not follow the substantive law. The Court of Appeals upheld the Trial Court's ruling. Petitioner verily believes this to be error because testimony elicited fell within the statutory requirement that the Defendant take what reasonable, positive steps are available to prevent the commission of the offense. The Trial Court owed Peittioner a duty to insure he recieved a fair trial. Within this context, considering the Trial Court was bound to give written instructions on all questions of law, the Trial Court owed Petitioner a duty to, at the least, allow his instruction to be reworded. Rather than allow Petitioner this opportunity, the Trial Judge summarily refused the abandonment instruction, which was tantamount to invading the province of the jury whose province alone it was to accept or reject the abandonment testimony. (See Appendix Exhibit "C"). This conduct on the part of the Trial Court and the Court of Appeals constitutes plain error in that it is clear that the refusal to instruct created manifest injustice. See *State v. Chaney*, 663 S.W. 2d 279 (Mo. App. 1983).

As far back as the early 1900's, the United States Supreme Court has supported a defendant's right to a full statement of the law from the Court and has stated that a neglect to give such a full statement of law to the jury is sufficient reason for the reversal of a case. See *Byrd v. United States*, 180 U.S. 356, 21 S. Ct. 403, 45 L. Ed. 570 (1900). Furthermore, the Supreme Court of Missouri has gone so far as to place the burden on the Trial Court to give excusable instructions, even when those instructions are not requested by the defendant (as they most certainly were in the instant case). *State v. Aitkens*, 179 S.W. 2d 84 (Mo. 1944).

Recently, the United States Supreme Court had an opportunity to provide some guidance in criminal cases on the issue of instructing the jury. Petitioner would ask this Court to review the case of *Mathews v. United States*, 485 U.S. _____, 108 S. Ct. _____, 99 L Ed. 2d 54 (1988), wherein this Court held the following:

> "As a general proposition, a Defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. 99 L Ed. 2d at 61, citing '*Stevenson v. United States*' 162 U.S. 313, 40 L Ed. 98, 16 S. Ct. 839 (1896). See also Wharton' Criminal Procedures, Sect. 538, P. 11 (12 ed. 1976)."

The United State Supreme Court in *Andres v. United States*, 333 U.S. 740, 68 S. Ct. 880 (1947) addressed the question of possible inadequacy of instructions in a capital murder case and held that any doubt as to the adequacy of instructions in a capital case must be resolved in favor of the Defendant. Appellant feels certain when this Court reviews and considers the refusal of this instruction, this Court will find a doubt as to the adequacy of the instructions submitted to the jury in the case at bar; a doubt which should be resolved in Petitioner's favor calling for a reversal of his conviction.

III.

WHETHER OR NOT THE REFUSAL TO STRIKE A JUROR FOR CAUSE WHO UNEQUIVOCABLY EXPRESSED DURING VOIR DIRE THAT HE REQUIRED THE DEFENDANT TO PUT ON EVIDENCE BY TESTIFYING WAS REVERSIBLE ERROR.

Petitioner complains of the Trial Court's refusal to strike a juror for cause who unequivocably expressed during voir dire that he required a defendant to put on evidence by testifying. This revelation by the juror was neither retracted nor was the juror rehabilitated in line with constitutional principles involving the mandate of a fair and impartial jury. The juror denunciated the prohibition against compulsory self-incrimination embodied in the Fifth Amendment, compelling Petitioner to exhaust his final peremptory challenge to his detriment. The exhaustion of peremptory challenges resulted in the seating on the panel of a juror whose law enforcement affiliations were unfavorable to Petitioner, thereby depriving him of a fair and impartial jury in violation of the Fourteenth Amendment.

The colloquy betweeen the defense attorney and the juror, Reichman, is as follows:

> MR. BINDER: . . . I want to tell you, there was a jury survey made years ago—not too long ago, where people were asked across the country, do they feel that a defendant should put on a little evidence, if he's accused of a crime. Fifty percent of the people thought he should. And that leads up to this question. Do any of you feel that my client, because

he's charged with this type of crime, should put on a little evidence to show that he's not guilty before we start, you know? Anybody that would feel like that?

UNIDENTIFIED: Such as? I don't know whether I'm following you.

MR. BINDER: That he has an obligation to come forth and put on some evidence to show that he's not guilty since the state has charged him with a crime. Do you feel like he ought to put on some evidence to convince you?

MR. RIECHMAN: Testify?

MR. BINDER: Whatever?

MR. REICHMAN: Sure.

MR. BINDER: You think he should?

MR. REICHMAN: Well, sure.

In *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639 6 L. Ed. 2d 751 (1961), this Court stated that a Petitioner must show the actual existence of an opinion in the mind of the juror as would raise the presumption of partiality. Petitioner would show that Juror Reichman's requirement that Mr. Leisure present evidence violated the standard of impartiality contemplated in *Irvin*, supra. See also *Smith v. Phillips*, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982) (due process means a jury capable and willing to decide the case solely on the evidence before it); *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975) (same).

Moreover, Petitioner submits that the very right to a jury trial guarantees to the accused a fair trial by a panel of impartial and indifferent jurors. Furthermore, the failure to afford an accused a fair hearing violates even the most minimal standards of due process. See *Irvin*, supra 366 U.S. at 722, 81 S. Ct. at 1642.

Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965) still stands for the proposition that the improper refusal to sustain a legitimate challenge for cause is deemed reversible error without a showing of actual prejudice. The fact the Defendant has caused the impartial juror to be striken from the panel through a peremptory challenge thereafter does not cure the violation because reducing a defendant's peremptory strikes has been held to be a substantial impairment of a constitutional right. See *United States v. Boyd*, 446 F.2d 1267, 1275 n. 27 (5th Cir. 1971).

Petitioner would respectfully submit that Reichman's fixed opinion was prejudicially adverse to the Fifth Amendment's proscription against compulsory self-incrimination. See Fifth Amendment to United States Constitution; *Charles v. State*, 573 S.W. 2d 139 (Mo. App. 1978). The juror's opinion was contrary to the constitutional guarantee of the presumption of innocence embodied in the Fifth Amendment. See *Gargotta v. United States*, 77 F.2d 977 (C.C.A. Mo. 1935). The Trial Court's refusal to grant Petitioner's challenge for cause constituted a deprivation of firmly established constitutional principles and the decision should have been reversed by the Court of Appeals.

Several Missouri opinions are squarely on point with the circumstances involved at bar. In *State v. Byrd*, 646 S.W. 2d 419 (Mo. App. 1983) several jurors showed a disregard of *Byrd's* constitutional right not to take the stand.

The jurors vocalized their belief that a Defendant should testify. They did not individually recant their opinions that *Byrd* should testify. The Missouri Appellate Court found the Trial Court's failure to remove the jurors for cause to be reversible error.

Other Missouri decisions note that the Lower Court Judge has a duty to closely evaluate the qualifications of a juror based upon a similar opinion. See *State v. Jones*, 679 S.W. 2d 253 (Mo. Banc. 1984); *State v. Draper*, 675 S.W. 863 (Mo. Banc. 1984); *State v. Wolfe*, 701 S.W. 2d 777 (Mo. App. 1985). Considering that Petitioner was tried for a capital offense, the Lower Court should have excluded the juror on the side of caution. See *State v. Carter*, 544 S.W. 2d 334, 338 (Mo. App. 1976).

Petitioner firmly believes that the statement by Reichman established the juror's bias and prejudice towards him. There can be no doubt that the juror's expression, abhorrent to the spirit of the Fifth and Fourteenth Amendments, raised a presumption of partiality. This presumption is unable to be rebutted based on the record which reflects that his opinion was never retracted nor rehabilitated. Petitioner would show that Reichman's fixed opinion was sufficient to sustain the challenge for cause due to his inherent prejudice and his refusal to abide by constitutional principles. The Trial Court, in denying the challenge for cause, created reversible error. The Appellate Court upheld the Trial Court's erroneous decision mandating the overturning of this conviction.

CONCLUSION

Petitioner respectfully submits that the improper introduction of ghastly photographs, having no probative value, denied him the guarantee of a fair trial. The Lower Court of Appeals conceded the photographs did not tend to prove or disprove an element of the case. Although the Court of Appeals deferred to the Trial Court's discretion the Fourteenth Amendment does not confer unreviewable and unlimited deference to a Trial Court's decision. The admission of this prejudicial and irrelevant evidence mandates the reversal of this conviction.

Petitioner asserts the denial of his abandonment instruction was reversible error. A defendant is entitled to have any theory of innocence, however improbable, submitted to the jury. The denial of the vital instruction denied Petitioner Due Process.

Petitioner submits the denial to sustain a challenge for cause on Fifth and Fourteenth Amendment grounds renders his conviction invalid. A juror whose fixed opinion is abhorrent to the Fifth Amendment's proscription against compulsory self-incrimination should be stricken for cause especially in a capital murder prosecution. The error is fatal and accordingly, the conviction should be reversed.

For all the reasons cited herein and upon a review of the record and the Appendix submitted herewith, Petitioner verily believes that this Petition for Writ Certiorari should be granted, and the Judgement of the Trial Court and the Missouri Court of Appeals, which affirmed the conviction, should be set aside and the Judgement of conviction reversed.

Respectfully submitted,

JOHN PAUL LEISURE

BY: Alvin M. Binder per ce
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CERTIFICATE OF SERVICE

I, Alvin M. Binder, attorney of record for the Petitioner, John Paul Leisure, do hereby certify that I have this day forwarded by United States mail, postage prepaid, a true and correct copy of the above and foregoing Petitioner's Petition for Writ of Certiorari to Honorable William L. Webster, Attorney General, State of Missouri, P. O. Box 899, Jefferson City, Missouri 65102.

This the 27th day of October, 1989.

Alvin M. Binder per ce
ALVIN M. BINDER

NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

JOHN PAUL LEISURE
Petitioner,

VS.

STATE OF MISSOURI
Respondent.

On Petition for a Writ of Certiorari
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APPENDIX
By Petitioner, John Paul Leisure

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APPENDIX

TABLE OF CONTENTS

		Page
EXHIBIT "A"	OPINION AND JUDGMENT OF THE MISSOURI COURT OF APPEALS FOR THE WESTERN DISTRICT OF MISSOURI	1A
EXHIBIT "B"	OBJECTION TO USE OF PHOTOGRAPHS AND RULING BY THE TRIAL COURT	1B
EXHIBIT "C"	JURY INSTRUCTION CONFERENCE AND RULING BY THE TRIAL COURT	1C
EXHIBIT "D"	CHALLENGE FOR CAUSE ON JUROR REICHMAN AND RULING BY THE TRIAL COURT	1D
EXHIBIT "E"	MISSOURI SUPREME COURT LISTING OF DENIAL OF MOTION TO TRANSFER	1E

EXHIBIT "A"

OPINION AND JUDGMENT OF THE MISSOURI COURT OF APPEALS FOR THE WESTERN DISTRICT OF MISSOURI

EXHIBIT "A"

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

WD 40,357
Opinion Filed:
April 18, 1989

STATE OF MISSOURI,
Plaintiff-Respondent,

vs.

JOHN PAUL LEISURE, also known as
Paul Leisure,
Defendant-Appellant.

NOTICE
THIS OPINION IS NOT FINAL UNTIL
ALL POST HANDDOWN MOTIONS HAVE
BEEN DISPOSED OF AND THE MANDATE
ISSUED AND RECEIVED.
(stamp)

APPEAL FROM THE CIRCUIT COURT
OF BUCHANAN COUNTY, MISSOURI

Honorable Gary Fenner, Judge

BEFORE NUGENT, P.J., SHANGLER, J., AND CLARK, J.

Defendant John Paul Leisure (hereinafter Paul Leisure) appeals from his conviction of capital murder for his part in the bombing death of James A. Michaels, Sr. The jury returned a sentence of life imprisonment without possibility of parole for fifty years. The defendant charges the trial court with error in refusing to give his proffered jury instructions, in refusing to excuse a juror for cause, in admitting hearsay testimony, in admitting evidence obtained by a federal wiretap, and in failing to order a mistrial following the prosecutor's improper closing arguments. We affirm.

He does not challenge the sufficiency of the evidence to sustain his conviction. Therefore, we only summarize the relevant facts.[1] The state charged Paul Leisure with capital murder as an accessory to the bombing death of James Michaels in St. Louis. The evidence showed that Mr. Michaels led a St. Louis organized crime syndicate composed of persons of Lebanese and Syrian descent and known as the "Syrians." An apparent conflict existed between the "Syrians" and certain Italian-American participants in organized crime. The Leisures were associated with the Syrian faction.

John Ramo and Joe Broderick, two of the participants in Mr. Michaels' murder, testified on the state's behalf. They described Paul Leisure as the leader of a group of men including Ramo and Broderick, David Leisure (Paul's cousin), Anthony Leisure (Paul's brother), Fred Prater, and Charles Loewe. The witnesses described the ultimate goal of the bombing was to gain control of Local 110 of the Laborers Union in St. Louis and to control the Syrian crime faction.

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1. Further description of the facts surrounding the Michaels murder appears in *United States v. Leisure*, 844 F.2d 1347 (8th Cir. 1988), and *State v. Leisure*, 749 S.W.2d 366 (Mo. 1988) (en banc).

Paul Leisure later participated in the management of Local 42 but did not belong to Local 110. He also owned a towing buisness, LN&P Tire Service, along with Anthony and David Leisure and Fred Prater. Anthony Leisure held the position of assistant business manager in Local 110 and had originally been slated to succeed Ray Massud as business manager, but shortly before his death from illness, Massud arranged for his son John Massud to succeed him.

According to that arrangement John Massud would control the business affairs of the union and Anthony Leisure, in the newly created position of assistant business manager, would control personnel decisions. At Paul's suggestion Joe Broderick, known for his ability as a street fighter, joined Local 110. He served as an organizer and later as a business agent.

Following Broderick's appointment, however, Anthony saw his influence decline. John Massud soon appointed two other union officials, Vince Giordano and Mike Trupiano, Jr. Then he hired James Michaels, III, the victim's grandson, as an organizer. The Leisures perceived Massud's moves as a violation of the arrangement giving Anthony control over personnel decisions. They also feared that Giordano and Trupiano, relatives of a powerful member of the Italian crime faction, would increase Italian influence over the union. Their unhappiness with the events at Local 110 increased when they learned that the union's financial problems threatened Joe Broderick's job there. Because Broderick was Anthony's only appointee, that development represented a further threat to his influence at the union.

The group decided to respond to those developments. The Leisures, Broderick, Ramo, and Prater discussed possible victims of retaliation. Massud's close ties with the Italians and the fear of a "war" with the Italians removed Massud

as a target. Similar considerations removed Giordano and Trupiano from the list. The group finally decided that by murdering Michaels they would not only enhance their power in the union, but they would also secure leadership of the Syrian organized crime faction. Michaels' part in allowing the man who murdered Leisure's cousin to escape in 1964 provided further motivation for choosing him as a target.

The Leisures originally scheduled Michaels' execution at his favorite breakfast restaurant. Anthony Leisure, Ramo and Broderick planned to enter the restaurant through a side door. Then Leisure and Ramo would shoot Michaels with shotguns while Broderick would prevent interference from the restaurant owner. Paul stayed at the LN&P office to relay information from surveillance of Michaels. The shooting plan ultimately failed because someone locked the side door to the restaurant and prevented a safe avenue for their surprise attack.

Following that failure, the group sought an alternative plan. The testimony indicated that Paul Leisure opposed bombing Michaels because he feared the type of retaliation it would provoke. The majority decided, however, to proceed with the bombing. Their preparation included obtaining the parts for the bomb, assembling it, stealing a car similar to Michaels' to practice attaching the bomb, testing the remote control detonator and conducting surveillance of Michaels to determine where the bombing should take place. They decided to attach the bomb to Michaels' car while he ate lunch at St. Raymond's Catholic Church.

Fred Prater and John Ramo assembled the bomb. On the day of the bombing Paul remained at LN&P's offices, again coordinating communications. Anthony and David Leisure, Ramo, and Broderick rode in the van used to transport the bomb to the church parking lot. David Leisure attached the

bomb to Michaels' car, Ramo drove the van, and Anthony operated the detonator. Because Mr. Michaels' grandson accompanied him to his car, the group had the opportunity to kill them both at once. Anthony Leisure rejected that possibility because Paul Leisure had directed him not to allow the bombing to occur on the church parking lot. A short time later, Anthony succeeded in detonating the bomb as the group followed Michaels down Interstate 55. The blast blew Michaels' upper torso out of the car, killing him instantly. The body struck another car, but Ramo swerved the van and avoided being hit by the debris. He left the highway and drove to Illinois where the group cleaned the van. Over the defendant's objection, the state presented photographs of Mr. Michaels' bloody remains on the highway.

Following the bombing, the group, at Paul's suggestion, attended Mr. Michaels' funeral as a "show of force." Michaels' grandson and brother eventually lost their positions in the union. In meetings with leaders of the Italians, Paul secured an agreement that he would control Syrian affairs, but he would stay out of Italian matters.

About a year later, Paul Leisure suffered severe injuries when a bomb exploded in his car. He presented photographs of those injuries to the jury. Later, federal authorities conducted a court-ordered electronic surveillance of the defendant's residence and LN&P's offices. At trial, the state, over the defendant's objections, presented tapes and transcripts of intercepted conversations. In the tapes, Paul discussed his motives for bombing Michaels and his belief that his own bomb injuries came in retaliation for Michaels' murder.

The state obtained indictments in St. Louis County against Paul, Anthony, and David Leisure, and Charles Loewe for the Michaels' murder and for other crimes not at issue here. In return for their testimony in this and other trials,

Ramo and Broderick received sentences for the reduced charge of second degree murder. The instant trial occurred in Buchanan County after the defendant's successful efforts for a change of venue and severance of the other charges and the other defendants.

During voir dire of the venire the following exchange took place between defense counsel Binder and venireman Reichman:

> Mr. BINDER: . . . I want to tell you, there was a jury survey made years ago—not too long ago, where people were asked across the country, do they feel that a defendant should put on a little evidence, if he's accused of a crime. Fifty percent of the people thought he should. And that leads up to this question.
>
> Do any of you feel that my client, because he's charged with this type of crime, should put on a little evidence to show that he's not guilty before we start, you know? Anybody that would feel like that?
>
> UNIDENTIFIED: Such as? I don't know whether I'm following you.
>
> Mr. BINDER: That he has an obligation to come forth and put on some evidence to show that he's not guilty since the state has charged him with a crime. Do you feel like he ought to put on some evidence to convince you?
>
> MR. REICHMAN: Testify?
>
> MR. BINDER: Whatever?

MR. REICHMAN: Sure.

MR. BINDER: You think he should?

Mr. REICHMAN: Well, sure.

Neither defense counsel nor the state questioned Mr. Reichman any further on that statement. He later stated that his father is a highway patrolman but that his father's involvement in law enforcement would not affect his judgment. The defendant originally advanced Mr. Reichman's law enforcement ties as grounds for his removal from the jury for cause. When the court noted Mr. Reichman's previous remarks about the defendant's failure to testify, defense counsel added that ground to his motion. The court denied the motion stating:

> THE COURT: All right. Well, I—In my opinion, those responses were made and, particularly in regard to Mr. Reichman, somewhat out of context, was not understanding the instructions of the court, if the defendant chooses not to testify in the case.
>
> I feel that his overall demeanor and response and attitude as exhibited, throughout the course of the voir dire, was that he would be a fair and imparital juror and that he would follow the instructions of the court.
>
> So I'll deny the request to strike No. 43.

The defendant employed a peremptory strike to remove Mr. Reichman from the jury. The defendant did not challenge three other veniremen who responded that they also expected the defendant at least to present some evidence. At the close of the bench conference on jury selection, the defendant moved to strike the entire panel on the ground

that a large proportion of the venieremen had ties to law enforcement personnel. The court denied that motion.

The prosecutor, in his closing argument, mentioned organized crime and referred to Ramo and Broderick as "thugs," and the defendant's responsibility for organizing those "thugs." He also mentioned the use of the LN&P garage as a "chop shop." Defense counsel also referred to the state's witnesses as thugs. He sought to describe their "dishonesty, disloyalty, evil, and jealousy," and referred to them as sunk in a "slimy cesspool of evil." He painted LN&P as a legitimate business.

The jury returned a verdict finding the defendant guilty of capital murder. In the sentencing phase, the jury rejected the death penalty and returned a sentence of life imprisonment without possibility of parole for fifty years. The court entered judgment on that verdict.

In his first point on appeal, the defendant argues that the trial court erred by refusing to give an instruction on the defense of abandonment, a circumstantial evidence instruction, instructions defining premeditation and deliberation, a converse instruction, and an instruction limiting the use of prior inconsistent statements. Only the circumstantial evidence instruction followed Missouri Approved Instructions.

The defendant's proposed instruction on abandonment did not follow the substantive law. One who asserts as a defense that he has withdrawn from a criminal enterprise must show that he timely contacted law enforcement officials or that he took other reasonable, positive steps to prevent the crime from being committed. *See* § 562.041.2(3); *State v. O'Neal*, 618 S.W.2d 31, 37 (Mo. 1981). MAI-CR2d 2.16 incorporates that requirement. The defendant's proposed instruction did not. A defendant has no right to a jury instruction that misstates the law. *State v. Calvert*,

682 S.W.2d 474, 480 (Mo. 1984) (en banc). The court properly refused the defendant's incomplete and misleading instruction.

The defendant cites *State v. Ball*, 654 S.W.2d 336, 340 (Mo.App. 1983), for the proposition that the court may properly give a circumstantial evidence instruction even when the state has presented direct as well as circumstantial evidence of guilt. There the court held that the trial court did not err in giving a circumstantial evidence instruction where the state supports its case with both circumstantial and direct evidence, but it did not hold that such an instruction must be given in that situation. In the instant case, the state presented direct evidence in the form of testimony from co-conspirators and from the defendant's own admissions. In light of such proof, the trial court need not give the circumstantial evidence instruction. *State v. Mallett*, 732 S.W.2d 527, 536 (Mo. 1987) (en banc); *State v. Bannister*, 680 S.W.2d 141, 148 (Mo. 1984) (en banc).

The court would have erred had it given the defendant's proposed instructions defining premeditation and deliberation. The notes on use for MAI-CR2d 33 limit the use of definitions to those instances in which the notes on use for a particular instruction expressly provide for a definition. If the notes call for no such definition, the court must not give one. *State v. Harris*, 670 S.W.2d 73, 80 (Mo.App. 1984).

The court rejected the defendant's first proposed converse instruction because it did not comply with MAI-CR2d. When the defendant offered a converse instruction in proper form, however, the court gave it. Therefore, the defendant suffered no prejudice. *State v. Jewell*, 473 S.W.2d 734, 740 (Mo. 1971).

In his proposed instruction on prior inconsistent statements, the defendant again misstated the law. The trial courts do not always admit prior inconsistent statements solely for impeachment purposes, as the defendant asserts in his proposed instruction. They may be admitted as substantive evidence in homicide prosecutions. *See* § 491.074; *State v. Moutray*, 728 S.W.2d 256, 263 (Mo.App. 1987). Because the proposed instruction misstated the law, the court properly refused it. *State v. Calvert, supra.*

The trial court committed no error in refusing any of the defendant's proposed instructions.

Mr. Leisure next contends that the court erred in failing to remove venireman Reichman for cause. During voir dire Mr. Reichman, when asked if he would expect the defendant to testify on his own behalf responded, "Sure, . . . Well, sure." Neither defense counsel, the prosecutor, nor the court, questioned Mr. Reichman any further about his opinion. Defense counsel advanced Mr. Reichman's responses as a ground for removal only after the court mentioned the matter. Counsel originally sought to remove Mr. Reichman only because his father serves on the Highway Patrol.

In *State v. Holland*, 719 S.W.2d 453 (Mo. 1986) (en banc), and *State v. Wolff*, 701 S.W.2d 777 (Mo.App. 1985), the courts reversed convictions when the trial court failed to remove for cause jurors who stated that they would expect the defendant to take the stand to tell his side of the story. In both of those cases the veniremen were told that the state had the burden of proving the defendant guilty even if the defendant presented no evidence on his behalf, yet the veniremen maintained their reluctance to accept uncritically the defendant's failure to testify. That attitude deprived the defendant in each case of a full panel of qualified jurors on which to exercise his peremptory challenges.

Holland, 719 S.W.2d at 454; *Wolff*, 701 S.W.2d at 718. Similarly, in *State v. Byrd*, 646 S.W.2d 419, 423 (Mo.App. 1983), the court reversed when two veniremen who shared that attitude actually served on the jury.

Other cases have found no error when the veniremen made such statements but ultimately agreed to follow the court's instruction concerning the state's burden of proof. *State v. Griffin*, 756 S.W.2d 475, 481 (Mo. 1988) (en banc); *State v. Grubbs*, 724 S.W.2d 494, 497 (Mo. 1987) (en banc). The trial judge may properly refuse to remove a juror who has indicated that he will yield his personal opinion to the court's instruction on the law. *Griffin, supra.*

In each case we must review a challenge for cause on its own facts. *State v. Stewart*, 692 S.W.2d 295, 298 (Mo. 1985) (en banc).

> While trial court refusal to sustain a challenge for cause constitutes reversible error, . . . it is well established that the trial court has wide discretion in determining the qualifications of a venireman, and its decision thereon will not be disturbed absent a clear abuse of discretion and a real probability of injury to the complaining party. . . . A clear line cannot be drawn for all cases as to when a challenge for cause should be sustained; there will be instances in which an appellate court might have done differently but cannot say there was an abuse of discretion; each case must be judged on its particular facts; a determination by the trial judge of the qualifications of a prospective juror necessarily involves a judgment based on observation of his demeanor and, considering that observation, an evaluation and interpretation of the answers as they

> relate to whether the venireman would be fair and impartial if chosen as a juror. . . . Because the trial judge is better positioned to make that determination than we are from the cold record, doubts as to the trial court's findings will be resolved in its favor. . . .

State v. Smith, 649 S.W.2d 417, 422 (Mo. 1983) (en banc) (citations omitted). The court must consider the entirety of a venireman's responses and not base its decision on a single statement. *Id.* at 425. Nor in this case should we overlook the fact that defendant's counsel, the person most sensitive to any prejudice to defendant in Mr. Reichman's comment, did not react to that comment.

We have reviewed the entire transcript of the voir dire. Mr. Reichman's answer that he would like to hear the defendant testify came before the court instructed him on that issue. That expression of his opinion followed a question that suggested the answer. Further examination of Mr. Reichman on other subjects supports the trial court's explicit finding that he would be a fair and impartial juror. In this close case, we cannot find an abuse of discretion in the court's failure to remove him for cause.

The defendant presents two arguments under his third point of error. He contends that the court erred by admitting hearsay testimony and that it erroneously admitted improper evidence of other crimes.

John Ramo testified about the 1964 murder of Paul Leisure's cousin, Richard Leisure, and the victim's participation in the escape of the murderer. Ramo testified that he learned of those facts from Paul Leisure. That testimony did not amount to inadmissible hearsay. It was not offered to prove that the murder occurred or that Michaels participated in it. Rather, it showed that the defendant believed

those allegations. The court could properly admit the testimony to show the defendant's state of mind rather than to show the truth of the matters asserted. *See State v. Harris*, 620 S.W.2d 349, 355 (Mo. 1981) (en banc). Moreover, even if we assume that the testimony amounted to hearsay, it repeated declarations made by the defendant. An exception to the hearsay rule permits a court to admit statements of a party. *State v. Rogers*, 674 S.W.2d 608, 612 (Mo.App. 1984). Ramo's testimony falls within that exception.

Another exception to the hearsay rule renders out of court statements of a co-conspirator admissible. *State v. Pizzella*, 723 S.W.2d 384, 388 (Mo. 1987) (en banc); *State v. Anding*, 689 S.W.2d 745, 753 (Mo.App. 1985). To establish such admissibility, the state must present independent evidence of the conspiracy, evidence to show that the declarant made the statements in the furtherance of the conspiracy and while the unlawful purpose continues to exist. *Anding, supra.* Where evidence of the conspiracy exists, the court may admit the statements even though the alleged conspirators have not been charged with conspiracy. *Pizzella, supra.* In fact, the co-conspirator need not be charged at all. *Anding, supra.*

The defendant objects to much of Ramo's testimony, arguing that because no independent evidence of the conspiracy exists, the hearsay statements contained in that testimony do not fall within the co-conspirator exception to the hearsay rule. Both Ramo and Broderick, however, testified to their own involvement in the plot to kill Mr. Michaels. Moreover, the wiretap evidence contained admissions by Paul Leisure that showed him acting as leader of the conspiracy. Sufficient evidence existed to support the admission of out of court statements by the non-testifying co-conspirators.

The testimony at trial and the wiretap evidence showed the defendant's involvement in organized crime. The defendant correctly states the general rule that the state may not

seek to prove a defendant's guilt of a particular crime by showing his propensity to commit other crimes. *See State v. Shaw*, 636 S.W.2d 667, 671-72 (Mo. 1982) (en banc). Evidence of the defendant's participation in other crimes may, however, be admitted when that evidence tends to show the defendant's motive, intent, absence of mistake or accident, a common scheme or plan, or the identity of the person charged. *Id.* at 672; *State v. Pilchak*, 655 S.W.2d 646, 650 (Mo.App. 1983). Here evidence of Paul Leisure's involvement in organized crime was relevant to his motive to kill Michaels and thereby seize control of the Syrian organized crime faction. The court properly admitted it.

The defendant's fourth point charges the trial court with error in admitting two color photographs showing the victim's shattered body. The defendant stipulated before the jury saw the pictures that Michaels' death had occurred as a result of the bombing. Therefore, he argues, they had no probative value and their admission served only to inflame the jury's passion.

The photographs are indeed unimaginably gruesome. Indeed, they are ghastly and horrifying. They show in color the bloody aftermath of bombing that severed the victim's upper torso from the remainder of his body, leaving his entrails trailing along the bloody road. The photos did nothing to prove the real issue in this case—whether Paul Leisure participated in the planning and commission of James Michaels' murder.

Nevertheless, our review of the authorities compels the conclusion that the photographs were not inadmissible. The trial court has broad discretion in determining the admissibility of such photographs. *State v. Jackson*, 499 S.W.2d 467, 472 (Mo. 1973). Justice Blackmar of the Supreme Court has even suggested that such discretion is unreviewable. *State v. Leisure*, 749 S.W.2d 366, 385 (Mo.

1988) (en banc) (opinion of Blackmar, J., concurring in part and dissenting to the admission of a gruesome photograph in the penalty stage of a capital murder trial). We reach the same conclusion. Once the prosecution establishes the relevance of the photographs to a material issue in the case, even where the defendant does not contest but concedes the issue, the trial court apparently has the sole discretion to determine whether the prejudicial effect outweighs the photograph's probative value. *See State v. Cummings*, 607 S.W.2d 685, 688 (Mo. 1980) ("[T]he question is not whether the photographs were gruesome and prejudicial, but whether or not they threw any relevant light on a material matter at issue.").

Moreover, recent cases on the subject reflect a low standard for relevance. *See e.g. State v. Leisure, supra*, at 379 (photo of a bombing victim of a different murder was admissible in penalty phase to prove the finding of the aggravating circumstance of prior convictions); *State v. Gardner*, 618 S.W.2d 40, 41 (Mo. 1981) (photo of the victim's decomposed body was relevant to show the body's location); *State v. Newbery*, 605 S.W.2d 117, 122 (Mo. 1980) (photo is admissible to prove identity and condition of the corpse; nature and locations of the wounds, the cause of death; or to corroborate or refute testimony). The fact that the photograph is cumulative of other evidence, makes no difference, *State v. Giffin*, 640 S.W.2d 128, 132 (Mo. 1982); *State v. Engleman*, 634 S.W.2d 466, 475 (Mo. 1982), nor does defendant's offer to stipulate to the evidence depicted in the photograph. *State v. Cummings, supra; State v. Sherrill*, 657 S.W.2d 731, 737 (Mo.App. 1983).

In *Cummings* the court did not discuss whether or why the prosecution needed the pictures of the scalded child to make its case; the photos simply showed the burned areas amply described in the medical testimony. In *State v. Gardner*,

supra, the defendant did not contest the location at which the defendant and the state's witness dumped the victim's body. The court in *Newberry, supra*, admitted three color photographs of the victim, a young woman, lying dead in her bedroom, stabbed in the chest and her throat slashed. The photos in *Giffin* showed a fatal shotgun wound about which no question could have been raised, witnesses having testified without challenge that defendant shot the victim and then fled until the police a short while later caught and arrested him in possession of the shotgun; the court did not discuss the prosecutor's need to offer the photographs. In *State v. Engleman, supra*, 634 S.W.2d at 474-75 (Mo. 1982), the court justified admission into evidence of three color photographs of the victim's body depicting the "considerable carnage" caused by the car bomb on the ground that they corroborated eyewitness descriptions of the body in the wreckage and because they showed the deliberation and malice of the bomber. The evidence showed that the defendant had earlier threatened to kill the victim and had once before attempted to bomb her car. In *State v. Sherrill, supra*, the evidence included defendant's statements that he had shoved Kemm, the victim, over a cliff and then stole his property. Sherrill also had told other witnesses that he intended to "roll" Kemm, who in fact had been stripped of his valuables.

The case cited by the defendant, *State v. Robinson*, 328 S.W.2d 667 (Mo. 1959), held inadmissible photographs of the deceased that the Supreme Court found "extremely obscene, offensive, vulgar, horrid, and repulsive." *Id.* at 671. Similarly, in *State v. Floyd*, 360 S.W.2d 630 (Mo. 1962), the court found no probative value in photographs of a badly decomposed body. But the Missouri Supreme Court brought the continued vitality of those precedents into question in *State v. Newberry, supra*, noting that the finding in *Robinson* occurred only after the court had reversed on another issue.

It also recognized that *Robinson* and *Floyd* had been repeatedly distinguished in cases reviewing the admissibility of photographs of murder victims. Therefore, the court rejected the defendant's challenge to the admission of photographs of the victim lying in the bedroom with her throat cut. *Id.* at 122.

The record reveals no reason for displaying the horror of the photographs of the shredded and sundered body of Mr. Michaels to the jury. Nevertheless, under the prevailing Missouri law we must defer to the trial court's discretion exercised against a background of appellate decisions that have for twenty years rejected claims of prejudice arising from admission into evidence of gory photographs.

The defendant's fifth point challenges the admission of the evidence obtained through the federal court's electronic surveillance of LN&P and of his home. He asserts that the affidavits on which the federal court based its order authorizing that surveillance did not establish probable cause. He also agrues that *Franks v. Delaware*, 438 U.S. 154 (1978), entitles him to a hearing on his allegation that the affidavit contained false information and that the trial court erred in failing to conduct a hearing on that issue.

Because the defendant has failed to provide us with a copy of the challenged affidavit in the record on appeal, we cannot review the trial court's finding on its sufficiency. *See State v. Jordan*, 751 S.W.2d 68, 74 (Mo.App. 1988). Moreover, the defendant has failed to establish his right to a *Franks* hearing. Merely to allege that the affidavit contained false information does not suffice. The defendant must also show that the affiant knew of the falsity or submitted the affidavit with reckless disregard for its truth or falsity. *Franks*, 438 U.S. at 171. The defendant's affidavit challenging the truth of the information in the government's affidavit

provides no basis for his claim that the government intentionally or recklessly employed false information.

Next, the defendant asserts that he suffered prejudice as a result of the prosecutor's improper closing argument. He complains of the prosecutor's description of the defendant's involvement in organized crime and his role as an "organizer of thugs." But defendant did not object to any of those comments. The prosecutor's discussion of the defendant's involvement in organized crime amounted only to a comment on evidence that, as we discussed earlier, is relevant to the defendant's motive to commit the crime charged against him. Counsel may comment on evidence in the record. *State v. Grant*, 702 S.W.2d 857, 864 (Mo.App. 1985).

The prosecutor's reference to Broderick and Ramo as thugs responded to the defendant's argument describing those worthies in the same terms. Similarly, his statement that stolen cars passed through the LN&P garage responded to defense counsel's argument that Paul Leisure ran a legitimate business. Even arguments that would otherwise be improper become appropriate when advanced in response to issues raised by the defendant's argument. *State v. Wood*, 596 S.W.2d 394, 403 (Mo. 1980) (en banc). Since the prosecutor made those arguments in response to defense counsel's argument and the factual record supported them, we find no error in the trial court's failure to intervene sua sponte in the prosecutor's closing argument.

Finally, the defendant contends that the cumulative effect of the trial court's alleged errors deprived him of a fair trial. We have found no error in any of the challenged rulings, therefore, the defendant's assertion of cumulative error must fail as well. *See Shepherd v. State*, 529 S.W.2d 943, 948

(Mo.App. 1975) ("Any number of non-errors cannot add up to an error.").

Accordingly, we affirm the trial court's judgment.

ANTHONY P. NUGENT, JR., JUDGE

All Concur.

EXHIBIT "B"

OBJECTION TO USE OF PHOTOGRAPHS AND RULING BY THE TRIAL COURT

the case until it is finally given to you to decide.

Ladies and gentlemen, I wish you a good evening. I hope that you can relax and get a good dinner tonight at the Ramada Inn. We will reconvene court in the morning, Hershel, at 8:30. I'd appreciate it if the jurors would be in the jury room at that time. Court's adjourned for the evening.

oOo

(December 2, 1987)

THE BAILIFF: The Circuit Court of Buchanan County, Division 4, is now in session. The Honorable Gary A. Fenner, presiding. Please be seated.

THE COURT: Good morning, ladies and gentlemen. I trust that Hershel took good care of you last night.

Mr. Rogers, you can begin with your evidence.

MR. ROGERS: Margaret Folkerts.

oOo

THE COURT: Be with you in just a moment, ma'am.

(Counsel approached the bench and the following proceedings were had:)

MR. ROGERS: Your Honor, based on what Mr. Binder or was it Mr. Kirksey said the other day, I have State's Exhibits No. 13, 14, and 15 here which the State will be offering into evidence. I'm holding them so the jury can't

see them at this time. Mr. Binder, I think, has had an opportunity to see them. But I'm showing them to the Court because I think that Mr. Binder has some objections to them that I'd just as soon get out of the way now. Another thing, Judge, do you want all of these dated by your clerk at some point?

THE COURT: Yes.

MR. ROGERS: I can–We can do that at break.

THE COURT: She does not have to stop while she writes because–since we're recording things; so if you just want to–I mean, if you hand them to her, as you are presenting them to a witness, it will just take her a second to write the date on it. However you want to handle it, it's fine.

MR. ROGERS: While we're doing this, she could actually just date some of these things.

THE COURT: Are you going to offer all of those today?

MR. ROGERS: Probably.

THE COURT: Okay. In regard to State's Exhibit 13, 14, and 15, Mr. Binder, do you have any objection?

MR. BINDER: We object to all three on the grounds that the–oh, I mean prejudice of these type pictures are excessive as to what their worth is before the jury. It's a denial of a right to fair trial by the use of this type of gruesome picture. It's deniable of due process under the Fourteenth Amendment, and they're not reliable; it would allow the imposition of a death sentence, for example, based on passion and prejudice. And I want to discuss these pictures with Your Honor.

We're in—I'm on Exhibit 15. We're in a case where we don't deny that the deceased met his death. We have, more or less, stitulated before the jury heretofore that he died on this highway. There is no reason for a picture of this type other than to appeal to passion and prejudice. These pictures depict a half of human being with their entrails laying out in the highway. Now, certainly we don't need three pictures like that. When we go to 14, 14 is more gross than 15. The issue of where the body lay, the issue of— There's no issue in this trial as to where the body was or the position of it. Picture 13 is more gruesome than 14. What purpose other than prejudice to the jury against the Defendant would these pictures be worth in evidence in this case we would ask the Court?

THE COURT: Thank you. Mr. Rogers, do you want to speak to this?

MR. ROGERS: Yes, Your Honor. I brought with me a packet of other photos, but I don't think I necessarily have to get them. These are probably the least gruesome, but I'd be happy to show the Court all the photos that have been taken.

These photos, though, we've narrowed down to these three for specific purposes. One, that while Mr. Binder would say they're willing to stipulate to the cause of death, the State isn't required to accept that. In meeting our burden of proof, we have to be able to show the extent of the damage to the body. Also, we'll have a coroner testifying, and these will explain his testimony. Each of the photographs shows a different aspect of the body. One shows the head sufficiently, particularly between 14 and 15 to make identification of the body possible. And we need that so the witnesses can identify who the body was. No. 13 shows another aspect of the injuries that's not visible in either

15 or 14. So in order to see the totality of the injuries to the trunk of the body, you actually have to have all three photographs because they're all from different angles.

THE COURT: What's the coroner going to testify about?

MR. ROGERS: He's–Well, he's going be on there talking about all the trauma, the fact that the lower section is missing. These, obviously, illustrate that. These illustrate where it came to rest on the body, the direction of the slide because part of the skid marks are there, and they're demonstrative of the description that the coroner is going to give, rather than going through the morgue photos, which are– Believe me, the morgue photos are much worse than this.

MR. BINDER: The what?

MR. ROGERS: The morgue photos are much worse than this.

MR. KIRKSEY: Your Honor, I would like to add in this objection that, simply put, the prejudice of these pictures to the Defendant, Paul Leisure, far outweighs the probative value. And as Mr. Rogers just mentioned, to me he brought it home of the real purpose, that the defense is willing to stipulate, as Mr. Binder said, the John(sic) Michaels, Sr. died on this interstate highway. As he just stated, he doesn't have to accept that stipulation, and he's got a burden of proof by not being willing to accept a stipulation, Your Honor, and it would be only more so, these going for one purpose and one purpose only, and that's to prejudice this jury against this Defendant by these pictures.

THE COURT: Well, I don't really know what the pictures show other than the severity of the damage to the body.

MR. ROGERS: And the identification of the body, Judge, so he can be identified as to who it is.

THE COURT: Why do you need the photograph, though, to have witnesses identify the body?

MR. ROGERS: Because the jury has a right to see what this man looked like, Judge. I mean, they do—We're talking about a 75-year-old man. That's going to be a factor they're going to take into in this case. We're talking about the severity and nature of the wounds because of this type of injury. These are all issues that are going to be important to the jury. While they're talking about stipulating to the cause of death, the State has a heavy burden in this case to convince the jury that this was a premeditated, planned murder, to show the extent of damage to the body, to show the type of individual that was injured, you know, and the nature and location of the wounds. And we've all admitted, as we talked about it during the voir dire, there's no question up front that these are gruesome photographs. But the state law in Missouri is that, you know, if it illustrates the nature and location of the wounds to the body, then it is admissible, even if it is gruesome.

THE COURT: I don't see why you need both 14 and 15. Do you have anything else to say?

MR. ROGERS: Yes, Your Honor, these are the two photographs that depict, you've got a side view and a partial front view of the face of the victim.

THE COURT: 14, you refer to as the side view?

MR. ROGERS: Yes. And 15 is more of a front view, but it's from the top of the body. It also shows the—Well, actually the head wound is shown in both of these.

THE COURT: Mr. Binder?

MR. BINDER: Your Honor, with all due deference, those two pictures are the same picture.

MR. ROGERS: Judge, we don't argue that this–We know it's the same body. These are three photographs from three different angles of the picture or–

THE COURT: You can–I'm going to overrule their objection as to Exhibit 13, and Exhibits 14 and 15, you can offer one or the other, and you can choose which one.

MR. ROGERS: Okay. Well, we might as well do that now, Judge, so we just–make the record clear. It will be–

THE COURT: Hold it.

MR. ROGERS: I'm sorry.

THE COURT: This is 13.

MR. ROGERS: Yeah, but I just wanted to–I wanted to compare the wounds displayed in this to these to figure out which one best illustrates what we're talking about. We're offering State's Exhibit 14 because of the two, there's more of the face visible, easier for identification of the individual. It's my understanding the Court does not–That of 14 and 15 the Court will only allow the State to offer into evidence one of the two.

THE COURT: Correct.

MR. GONZALES: So we have selected 14, and 15 will not be offered or identified by the witnesses.

THE COURT: Thank you.

MR. BINDERS: Thank you, Your Honor.

THE COURT: All right. For purpose of the record your objection is considered to be a standing objection. You do not need to renew your objection at the time Exhibits 13 and 14 are offered. The objection is noted for the record.

MR. BINDER: Thank you very much, Your Honor.

MR. GONZALES: Judge, while we're up here, we also have an Exhibit 56 which has been added to Tape No. 20, what we'll refer to as a business stipulation that has been signed and filed as of yesterday. (Inaudible)--now.

MR. ROGERS: Just for your information--

MR. BINDER: Is that in the transcript you gave me yesterday?

MR. GONZALES: Yeah, and it's a stipulation for that Tape No. 20.

MR. BINDER: The one that mentions dimensions, though? You submitted a copy of it. Is this--

MR. GONZALES: No, huh-uh. No, that was from an earlier stipulation.

THE COURT: Thank you, gentlemen.

(Proceedings returned to open court.)

THE CLERK: Raise your right hand.

EXHIBIT "C"

JURY INSTRUCTION CONFERENCE AND RULING BY THE TRIAL COURT

EXHIBIT C

THE COURT: Thank you, gentlemen. You can be seated. Do you want copies of these verdict forms or not, Bill?

MR. ROGERS: If you have them, I will. On Instruction 1A, I misinformed the Court earlier. 7, 9, 10 is what it should be rather than 7, 8, 10.

THE COURT: 7, 9, and 10?

MR. ROGERS: Yes, sir.

THE COURT: All right. Also, here's a retyped copy of Instruction No. 9. This is the one where the typographical error said "this" and it should have been "his." I just give that to you so that you might have a chance to look at it and make sure that it's correct now.

Are you gentlemen ready to discuss this?

MR. KIRKSEY: Yes, we are.

THE COURT: All right. Well, let the record reflect that this is the formal instruction conference, that the Defendant is present and all of the attorneys are present also.

Gentlemen, we have informally discussed the instructions in my chambers, and at this time, Mr. Kirksey, I understand that you are requesting that the Court give Instruction 1A, which is not in MAI but is a modification of MAI Criminal Instruction 2d 2.16. The references in that instruction to other instructions would be No. 7, 9, and 10.

MR. KIRKSEY: Yes, sir, Your Honor.

THE COURT: Do you have any further record you want to make on that now, Mr. Kirksey?

MR. KIRKSEY: Your Honor, nothing further except that I would like of record that this is a modified 2.16. We feel like the evidence in the case before the bar justifies the granting of said instruction.

THE COURT: All right. Thank you. That instruction is refused. And I also understand that you wish to offer MAI Criminal Rule 2d 3.42, Mr. Kirksey, which I've marked 1B, and that's the circumstantial evidence instruction?

MR. KIRKSEY: Yes, sir, Your Honor.

THE COURT: All right. That instruction is refused also. And I further understand that you wish to have the Court read Instruction 1C, which is MAI Criminal Rule 2d 3.52 modified.

MR. KIRKSEY: Yes, sir, Your Honor.

THE COURT: All right. And that instruction is refused. And I further understand that you wish for the Court to instruct the jury on the—on a definition of premeditation. I've marked that Instruction No. 1D, not in MAI; and you've cited me the authority of the case of State vs. Mallady 669 S.W. 2d 52?

MR. KIRKSEY: Yes, sir, Your Honor.

THE COURT : All right. That instruction is

EXHIBIT "D"

CHALLENGE FOR CAUSE ON JUROR REICHMAN AND RULING BY THE TRIAL COURT

EXHIBIT D

No. 42 is denied.

MR. KIRKSEY: Your Honor, we would move to strike juror No. 43, Reichman. His father is a Missouri Highway Patrolman, connection with law enforcement. For that reason, should be dismissed for cause, Your Honor.

THE COURT: Well, Mr. Reichman also said that he felt the Defendant should put on some evidence to defend himself.

MR. KIRKSEY: That's right, Your Honor. Excuse me.

THE COURT: And–

MR. ROGERS: Your Honor, I believe that all those people were advised by Mr.–While that's their attitude, they were advised by Mr. Binder, and we got agreement from everybody at that point and put in the record that everybody was nodding their heads to the fact that they realize the Defendant didn't have to do anything.

Mr. Reichman indicated he could follow the law. So, having been appraised of the law, he and everybody nodded in agreement that they could, in fact, hold the State to its burden and not require something from the Defendant.

MR. KIRKSEY: We would additionally move for cause on the basis that he did indicate, Your Honor, that he would require something from the Defendant.

THE COURT: All right. Well, I–In my opinion, those responses were made and, particularly, in regard in Mr. Reichman, somewhat out of context, was not understanding

the instructions of the Court, if the Defendant chooses not to testify in the case.

I feel that his overall demeanor and response and attitude as exhibited, throughout the course of the voir dire, was that he would be a fair and impartial juror, and that he would follow the instructions of the Court.

So, I'll deny your request to strike No. 43.

MR. KIRKSEY: Your Honor, juror No. 45, Brown, has two brothers who are police. He's been a victim of crime. And this gentleman, Your Honor, has a BS in criminal justice and would have the training in evidence, criminal law. And contrary to what Mr. Rogers says, I do believe the study of law has some hindrance on a jury, denying—a jury person.

A juror is supposed to decide the case based on the evidence that he hears in the courtroom and the instructions of law that the Court so gives to him. He walks into that Court—into that jury room vested about him with the evidence that he's heard in those instructions. Anyone trained to the degree that someone would have a BS in criminal justice would have the knowledge of the system of the evidence, procedures of investigation, Your Honor, would tend to not be a neutral and detached person in the jury room and would, we believe, taint the procedure of deliberation, Your

MR. KIRKSEY: –for the basis that, when questioned at the bench by the Court, State, and the Defense, there was a discussion concerning an article mentioning therein "Mafia."

To my knowledge, that article did not contain the word "Mafia," Your Honor, and I question whether he was quite sincere with the Court and whether he's heard more or read more than he so indicated about this case. And since we do have more than necessary to keep the inference of impropriety down, I move that Mr. Budine be stricken for cause for that reason.

THE COURT: All right. Your request to strike 54, Budine, is denied.

MR. BINDER: Excuse me one second. Comes now the Defendant, John Paul Leisure, and, with respect, moves this Court to strike the panel, per se, that he is to select his jurors from, on the grounds that the panel is not representative of the proper percentage of jurors in this area, in that there is an unusual high percentage of jurors on this panel that are related by marriage and/or by birth, with law enforcement people, being fathers, sons, sons-in-law, and so forth. And that it is a disproportionate number of jurors that he is to select from that represent the State.

He further objects on the basis of the 4th, 5th, 6th, 8th, and 14th Amendments to the Constitution, Articles 1, Sections 19, 15, 18A, 21, and 10 of the Missouri Constitution. Thank you.

THE COURT: Thank you. Your motion to strike the entire panel is denied.

MR. BINDER: Thank you, Your Honor.

THE COURT: You gentlemen have any further record you'd like to make? I will number on the original jury list, which I'll leave at the bench, Nos. 1 through 30, and I'll draw a line, and I will number 31 through 34 and draw another line. And you can make your strikes from those lists.

MR. ROGERS: Your Honor, if you'd bear with me a second. Can we just go down and make sure–

THE COURT: Sure.

MR. ROGERS: –there's–

MR. KIRKSEY: Can I ask a question?

THE COURT: Un-huh.

MR. KIRKSEY: Can we do the strikes here–Could we just write it on here, that way, or we do–

MR. ROGERS: I don't know physically how you're going to–

THE COURT: Well, what–What, normally, we would do is, I would leave the list here. And Mr. Rogers, when he has decided on the nine individuals that he's going to strike from the first 30, he'll come up, and he'll draw a line through their name–

EXHIBIT "E"

MISSOURI SUPREME COURT LISTING OF DENIAL OF MOTION TO TRANSFER

MOTIONS FOR REHEARING

71265 In re Marriage of: T.B.G., pet.-app., vs. C.A.G., now known as C.A.M., resp.

Pet.-App.'s motion for rehearing and reconsideration overruled.

71125 State of Missouri, resp., vs. Michael E. Madsen, app.

App.'s motion for rehearing overruled.

70910 State of Missouri, resp., vs. Greg Simmer, app.

App.'s motion for rehearing overruled.

APPLICATIONS TO TRANSFER AND RECOMMENDATIONS FOR TRANSFER

71462 State ex rel. Terry M. Evans, rel., vs. Honorable Richard L. Parker, Judge, etc., resp.

Resp.'s application to transfer from the Missouri Court of Appeals, Western District No. 41494, denied.

71732 State of Missouri, plff.-resp., vs. Denise Marie Sinner, deft.-app.

Deft.-App.'s application to transfer from the Missouri Court of Appeals, Eastern District No. 54786, denied.

71733 James Moore, mov., vs. State of Missouri, resp.

Mov.'s application to transfer from the Missouri Court of Appeals, Eastern District No. 54951, denied.

71734 James D. Edwards, app., vs. State of Missouri, resp.

App.'s application to transfer from the Missouri Court of Appeals, Eastern District No. 55672, denied.

71755 State of Missouri, plff.-resp., vs. Johnnie Dewayne Miller, deft.-app.

Deft.-App.'s application to transfer from the Missouri Court of Appeals, Southern District No. 15744, denied.

71757 Millard L. Swenson, app., vs. State of Missouri, resp.

App.'s application to transfer from the Missouri Court of Appeals, Western District Nos. 41018 & 41065 (consolidated), denied.

71758 Jerry Houston, a/k/a Clarence Dorsey, app., vs. State of Missouri, resp.

App.'s application to transfer from the Missouri Court of Appeals, Western District No. 41064, denied.

71759 State of Missouri, plff.-resp., vs. John Paul Leisure, a/k/a Paul Leisure, deft.-app.

Deft.-App.'s application to transfer from the Missouri Court of Appeals, Western District No. 40357, denied.

71760 State of Missouri, plff.-resp., vs. Robert Lee Schaeffer, deft.-app.

Deft.-App.'s application to transfer from the Missouri Court of Appeals, Eastern District No. 53294, sustained and cause ordered transferred.

71763 Robin Milligan, app., vs. State of Missouri, resp.

App.'s application to transfer from the Missouri Court of Appeals, Western District No. 40789, denied.

71768 James Jones, mov.-app., vs. State of Missouri, resp.-resp.

Mov.-App.'s application to transfer from the Missouri Court of Appeals, Eastern District No. 55316, denied.

71769 Theodore L. Glass, mov.-app., vs. State of Missouri, resp.-resp.

Mov.-App.'s application to transfer from the Missouri Court of Appeals, Eastern District No. 55367, denied.